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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE MARTIN SUXAL, *Petitioner*

v.

DAVID R. LARGE, SUPERINTENDENT
FEDERAL PRISON CAMP
MILL POINT, W. VA.
Respondent

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

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INDEX

Subject Index

	PAGE
Title of cause	*Front cover*, 1
Petition for writ of certiorari	1
Summary of matters involved	1
Questions presented	3
Statement of case	5-8
Form and history of action	5
Facts	5
How issues raised	8
Specification of error	9
Reasons relied on for granting writ	10
SUPPORTING BRIEF	13-34
Preliminary	13
Argument	13-33
ONE—Refusal by the sentencing court to permit petitioner to challenge the validity of the draft board order, in defense to the indictment charging him with refusal to submit to induction, was a denial of a judicial trial contrary to the due process clause of the First Amendment to, and the bill-of-attainder clause of, the Constitution so as to make the judgment of conviction subject to collateral attack on a writ of habeas corpus, irrespective of the validity of the draft board proceedings	13
TWO—Even assuming that petitioner's right to release upon the writ of habeas corpus is dependent exclusively upon the invalidity of administrative proceedings, the undisputed evidence shows that the draft boards arbitrarily and capriciously denied him his claim for exemption from training and service as a minister of religion and that the classification given him was without basis in fact; accordingly, the order supporting his indictment was void	28
Conclusion	34

Cases Cited

Adams v. United States ex rel. McCann 317 U. S. 269	22
Albert v. Goguen 141 F. 2d 302 (CCA-1)	14
Bain, Ex parte 121 U. S. 1 (1887)	11, 21
Baker v. Baker Eccles & Co. 242 U. S. 394, 401	10, 18
Bowen v. Johnston 306 U. S. 19, 23-25, 26, 27	10, 14, 1[illegible]

CASES CITED *continued*

PAGE

Bradstreet v. Neptune
3 Sumn. (U. S.) 600 ..... 17, 18

Burns v. Carrollton
— Ga. App. —, 34 S. E. 2d 621 33

Cain, Ex parte
39 Ala. 440-441 30

Callan v. Wilson
127 U. S. 540 ..... 11, 22

Chicago M. & S. P. R. v. Minnesota
134 U. S. 418, 456-457 17

Clowans v. Rives
104 F. 2d 240 21

Commonwealth v. Akmakjian
316 Mass. 97, 55 N. E. 2d 6 33

Commonwealth v. Richardson
313 Mass. 632, 638 33

Cummings v. Missouri
4 Wall. 277, 320-332 ..... 17, 18

Diaz v. United States
223 U. S. 442 20

Donley v. Colorado Springs
40 F. Supp. 15 33

Dowell v. United States
221 U. S. 325, 330 20

Edwards v. United States
312 U. S. 473 20

Estep v. United States
No. 293 Oct. T. 1945:
Petitioner's Joint Brief, pp. 131-190 33
Slip opinion, p. 7, note 15 15
— U. S. —, 66 S. Ct. 423, 428 (note 17), 429-433 ..... 13, 14, 15, 17, 25

Follett v. McCormick
321 U. S. 573 32

Frank v. Mangum
237 U. S. 309, 330-331, 335-347 ..... 11, 21

Griffin v. Griffin
— U. S. —, 66 S. Ct. 556 ..... 10, 18

Hawk, Ex parte
321 U. S. 114 14

Helvering v. Bliss
293 U. S. 144 29

House v. Mayo
324 U. S. 45 15

Hovey v. Elliott
167 U. S. 409, 413-415, 417-418 ..... 10, 17, 18, 19

	PAGE
Johnson v. Zerbst 304 U. S. 458, 463, 468	10, 11, 16, 17, 22
Jones v. Huff 152 F. 2d 14 (App. D. C.)	17
Jones v. Kentucky 97 F. 2d 335 (1938, CCA-6)	21
Jones v. Moultrie — Ga. App. —, 33 S. E. 2d 561	33
Kentucky v. Jones 10 Bush (70 Ky.) 725	18
Lisemba v. California 314 U. S. 219, 236	20
Manning v. Biddle 14 F. 2d 518, 519 (CCA-8)	22
McVeigh v. United States 11 Wall. 259, 261, 267-268	10, 17, 18, 19
Moore v. Dempsey 261 U. S. 81, 86, 88, 91	11, 21
Murdock v. Pennsylvania 319 U. S. 105	32
National Exchange Bank v. Wiley 195 U. S. 257	18
Nielsen, Hans, Ex parte 131 U. S. 176, 184-185 (1889)	10, 21
Old Wayne Life Ass'n v. McDonough 204 U. S. 8, 23	10, 18
Ong Chang Wing v. United States 218 U. S. 272, 279	17, 19
Potter v. Dowd 146 F. 2d 244 (CCA-7)	22
Rea v. McDonald 153 F. 2d 190 (CCA-5) cert. denied March 25, 1946, 66 S. Ct 820; rehearing denied April 22, 1946, 66 S. Ct. 959	1, 10, 15
Rinko v. United States 147 F. 2d 1 (CCA-7) cert. denied 325 U. S. 851, 894	15
Rogers v. Peck 199 U. S. 425, 435	19
Rossier, In re 76 U. S. App. 214, 133 F. 2d 316, 322-324	17
Screws v. United States 325 U. S. 91	23
Semansky v. Stark 196 La. 307, 199 S. 129	33
Shreveport v. Teague 200 La. 679, 8 S. 2d 640	33
Siebold, Ex parte 100 U. S. 371, 375	16
Smith v. O'Grady 312 U. S. 329, 333	21

PAGE

Smith v. United States
148 F. 2d 288 (CCA-4) 25
66 Oct. T. 1945, Petitioner's Joint Brief, pp. 131-190 33
— U. S. —, 66 S. Ct. 423, 429 ..... 15, 26

State v. Meredith
197 S. C. 351, 15 S. E. 2d 678 33

Swaczyk v. United States
156 F. 2d 17 (CCA-1) decided June 13, 1946, pending on petition for writ of certiorari, No. 290 Oct. T. 1946: Petition for writ of certiorari, pp. 21-41 38

Thomas v. Atlanta
59 Ga. App. 520, 1 S. E. 2d 598 33

Trinidad v. Sagrada Orden, etc.
263 U. S. 578 29

United States v. Lovett
— U. S. —, 66 S. Ct. 1073 18

United States ex rel. Arpaia v. Alexander
146 F. 2d 847 (CCA-2) 13, 14

United States ex rel. Falbo v. Kennedy
141 F. 2d 689 (CCA-4) cert. denied 322 U. S. 745 ..... 13, 14

United States ex rel. Hall v. Stalter
151 F. 2d 633 (CCA-7) 11, 32

United States ex rel. Lohrberg v. Nicholson
141 F. 2d 689 (CCA-4) cert. denied 322 U. S. 744 ..... 13, 14

United States ex rel. McCann v. Adams
320 U. S. 220, 221 22

United States ex rel. Trainin v. Cain
144 F. 2d 944 (CCA-2) 17

Waley v. Johnston
316 U. S. 101, 104-105 ..... 10-11, 21, 23

Walker v. Johnston
312 U. S. 275, 286 ..... 11, 22

Williams, Ex parte
317 U. S. 604 14

Williams v. Kaiser
323 U. S. 471, 477, 485 16

Wilson, Ex parte
114 U. S. 417 (1885) 11, 21

Windsor v. McVeigh
93 U. S. 274, 277, 278-279 ..... 10, 17, 18

Wong Wing v. United States
163 U. S. 228 20

Statutes Cited

	PAGE
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925	2, 34
Rules, Supreme Court of the United States, Rule 38	2, 34
United States Code:	
Title 28, secs. 451-464 ["Habeas Corpus Act"]	2
Title 50, App. secs. 301-318 ["Selective Training and Service Act of 1940" as amended, sections 3 (a), 5(d), 10 (a), 11]	2, 5, 10
United States Constitution	
Article I, sec. 9, clause 2	2
Article I, sec. 9, clause 3	2, 3, 4, 8, 13, 17
Article III, sec. 2, clauses 1-3	2, 17
Amendment I	13
Amendment V	2, 3, 4, 8, 11, 17
Amendment VI	2, 3

Selective Service Material Cited

Opinion No. 14, National Headquarters, Selective Service System, June 12, 1941, amended Nov. 2, 1942	28
Regulations, Selective Service (32 C. F. R. Supp. 615.81 et seq.) sections—	
615.81	2
615.82	2
622.44	2, 31
622.51	2
623.1	2
623.2	2
623.21	2
623.61	2
625.1	2
625.2	2
629.1-629.35	2
633.2	2
633.21	2
642.41	2
642.42	2
Selective Service in Wartime, Second Report of Director of Selective Service 1941-42 (Government Printing Office, Washington) pp. 230-241	28
State Director Advice 213-B, June 7, 1944, amended Sept. 25, 1944	28

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Theodore Martin Sunal petitions this Court for a writ of certiorari. He shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The denial of certiorari by this Court in *Rea* v. *McDonald*, 66 S. Ct. 820, does not foreclose the questions presented here. Although the facts are identical, the conclusions in the two cases are different. In the *Rea* case, the court of appeals (153 F. 2d 190) held that the writ of habeas corpus was not available. The court below held that the writ of habeas corpus was an available remedy. [102, 104-107]* Then the court below held that the prisoner was

* Bracketed figures appearing in this petition and the supporting brief refer to pages of separately-bound printed appendix.

properly remanded in spite of the alleged denial of constitutional rights because petitioner was liable for training and service as charged in the indictment. [109]

2. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter, but appears in the record. [102-118]

3. *Jurisdiction.*

Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

4. *Timeliness of this petition.*

The judgment of the Circuit Court of Appeals was rendered and entered on July 29, 1946. [118-119] The petition for writ of certiorari is filed within three months from that date.

5. *Statutes and Regulations involved.*

Scope and effect of the Habeas Corpus Act (28 U. S. C. secs. 451-464) are involved. Also drawn in question is the construction and application of the Selective Training and Service Act of 1940, as amended, sections 3 (a), 5 (d), 10 (a), and 11 (50 U. S. C. App. secs. 301-318). Also involved are the Selective Service Regulations, sections 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

6. *Constitutional provisions involved.*

Clause 2 of Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 of Section 9 of Article I prohibiting bills of attainder is invoked. Clauses 1-3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments are relied upon.

Questions Presented

1. Did refusal of the convicting court to permit petitioner to attack the validity of the draft-board order supporting the indictment constitute a denial of a judicial trial to petitioner, contrary to the due-process and bill-of-attainder clauses of the Constitution, so as to make the judgment of conviction subject to collateral attack upon writ of habeas corpus?

2. Did the courts below, after holding that denial of the right to challenge the validity of the draft-board order by the convicting court was sufficient ground for granting the writ of habeas corpus, err in remanding petitioner because, after review of the proceedings in the convicting court, they were of the opinion that there was basis in fact for the draft-board order which, in their opinion, was valid?

3. Upon the hearing of a writ of habeas corpus to determine the validity of restraint of one held under conviction on account of refusal to submit to induction as ordered by a draft board, because of refusal of convicting court to permit the prisoner to challenge the validity of the draft-board order, is the issue confined to the validity of the draft-board proceedings?

4. Upon the hearing of a writ of habeas corpus to determine the validity of restraint of one held under conviction on account of refusal to submit to induction as ordered by a draft board, because of refusal of convicting court to permit the prisoner to challenge the validity of the draft-board order, is the error of the convicting court cured through a finding of the habeas corpus court that the draft-board proceedings sustaining the jurisdiction of the convicting court are valid?

5. May petitioner, by writ of habeas corpus, collaterally attack the conviction for refusal to submit to induction on the ground that the convicting court denied him the right to challenge the validity of the draft-board order, contrary to the due-process and bill-of-attainder clauses of the Constitution, irrespective of the validity of the draft-board order?

6. Is the denial of the right to challenge the validity of a draft-board order in petitioner's defense against the indictment charging him with refusal to submit to induction, reviewable only on direct appeal from the judgment of conviction and not collaterally by writ of habeas corpus?

7. Did the courts below err in holding that the draft-board determination supporting the conviction of petitioner had basis in fact, was not issued in excess of authority, contrary to law, arbitrarily and capriciously, and contrary to the due process clause of the Fifth Amendment to the Constitution, since the undisputed evidence showed that petitioner was an ordained minister of religion, exempt from all training and service under the Act?

Statement of Case

FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of Rudolph J. Sunal. It was alleged that the petitioner was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Western District of Pennsylvania based upon an indictment charging petitioner with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the Selective Service board. [1-20]

The district court issued the writ of habeas corpus. [20] The warden, respondent, filed his return, together with a demurrer and motion to dismiss. [21-27] Evidence was received. [84-94] The case was argued, at the conclusion of which the court discharged the writ of habeas corpus and remanded petitioner to the custody of respondent. [98-99] Thereupon application was made to have petitioner admitted to bail pending a disposition of this appeal. [98] Bail was allowed because of substantial questions that should be decided by this court upon appeal. [99] The court entered findings of fact and conclusions of law, as well as the judgment. [96-98] Notice of appeal and bond were duly filed.

FACTS

Petitioner duly registered under the Selective Training and Service Act of 1940 with Local Board No. 26, at Pittsburgh, Pennsylvania. In the Selective Service questionnaire, he did not fill in Series VIII in reference to the claim for exemption as a minister of religion. [30] Later

on he filed a number of papers explaining why he did not fill out this portion of the questionnaire. [37-83] Moreover, he filed evidence showing that he was regularly engaged as a minister of religion. [42-45, 63-65, 67-69, 73] At the time his first classification was given he was a part-time minister of Jehovah's witnesses. On July 1, 1941, the local board placed him in Class I-A. [31] He appealed and was classified as a conscientious objector, Class IV-E, making him liable for training and service in a Civilian Public Service Camp. [31] He failed to report for work of national importance. [4] He was indicted, tried and sentenced to a term of two years. [4] He served this sentence. Thereafter petitioner entered the full-time pioneer missionary ministry upon release from prison, and engaged therein for approximately one year before he was again classified. In such full-time ministry, he devoted an average of 150 hours monthly to his actual ministerial work. He did part-time secular work, spending approximately three hours or four hours daily to the performance of duties in his secular work. [4, 5] The secular work did not interfere with his full-time ministerial work. [5] He was recognized by scores of people* who filed affidavits and petitions with his draft board showing that they recognized him as standing in relation to Jehovah's witnesses in the same manner as do regular and duly ordained ministers. [51-66] He was looked upon by Jehovah's witnesses and other persons as having the same position toward Jehovah's witnesses as do the ministers of the orthodox religious denominations toward their congregations. [51-66] Moreover his draft board file

* Affidavits and petitions were signed by 103 persons. Before the hearing officer of the Department of Justice eighteen persons appeared who testified concerning his ministerial activity. The entire draft board file which was received in evidence by the court below is not being printed in its entirety because of the expense involved. The file is very voluminous. Only portions thereof have been printed as part of Appendix. [37-83] The court is referred to the draft board file, however, which is among the exhibits filed with the Clerk of this Court.

showed that he regularly performed ceremonies and duties that are customarily performed by orthodox clergy. [67-73] There was no evidence in the file to show that he was not regularly teaching and preaching as a full-time minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, duly recognized religious organizations under the Act. [67-73] In spite of the undisputed evidence showing that at the time of his classification he was a minister of religion his local board on May 20, 1944, placed him in Class I-A making him liable for training and service in the armed forces. [32] He requested a personal appearance before the local board, which was granted. [32, 49-50] His claim for exemption as a minister was again denied and his classification continued. [78-79] He appealed to the board of appeal which affirmed his I-A classification. [32-33, 67-77] In due course he was ordered to report for induction. [5-6, 33] He responded to the order, reported at the induction station and completed the selective process. [5-6, 33] After he was accepted, following his final physical examination, he refused to step forward and submit to induction as a part of the induction ceremony. [6, 33] He was released by the armed forces, arrested and charged with an alleged violation of the Selective Training and Service Act. [6, 33]

Petitioner pleaded not guilty to the indictment charging him with refusal to submit to induction. [10, 33] On the trial to a jury he offered in evidence his entire draft board file. He offered other evidence in the form of *de novo* testimony. [10-11] All the evidence was offered for the purpose of establishing that the Selective Service System acted illegally, in excess of its authority, without due process of law and arbitrarily and capriciously denying him his claim for exemption as a minister of religion. [10-11] The trial court refused to admit such evidence, to which exception was taken. [11-12] The judge instructed the jury that the draft board classification could not be attacked in defense to the indictment. [11] Petitioner excepted to

this. [11] The jury returned a verdict of guilty. [12] Petitioner was sentenced to serve five years in the custody of the attorney general. [12] No appeal being taken from such judgment, he was committed to the custody of the warden of the Federal Prison Camp located at Mill Point, West Virginia. [98]

How Issues Raised

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the court below. [1-17, 23-27, 98-99, 103] In the petition for writ of habeas corpus, petitioner contended that upon the trial of the indictment before the jury in the District Court for the Western District of Pennsylvania, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [2-3] It was contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, and in refusing him the right to offer evidence to show the invalidity of the order. [11] By reason of this action of the convicting court, it was claimed that he was penalized contrary to the due process clause and being denied his defense to the indictment. [11-12] It was contended that the court transferred the judicial power of the court to the draft board, denying him his right of trial by jury, refusing him the right to a judicial trial and abridging his liberty, contrary to the due process clause of the Fifth Amendment to the United States Constitution. [12] Moreover, it was alleged that the Act and Regulations had been transformed into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution. [12]

The courts below held that the holding and action of the convicting court was grounds for discharge upon a petition

for writ of habeas corpus providing the draft board file showed that petitioner was arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [88-89, 107] However, the courts below held that the holding and action of the convicting court was harmless error and not grounds for the discharge of petitioner because the draft board record contained evidence on which the draft boards were justified in placing petitioner in Class I-A and denying his claim for exemption as a minister of religion. [89, 92, 96, 109, 112-115] The basis for this conclusion was that because petitioner devoted part of his time to the performance of secular work, he could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [90, 92-93, 115-117] The courts concluded that the action of the draft boards in denying petitioner the ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary or capricious. [93, 96-97, 113, 115-116] The courts below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [96-97, 109, 112] The courts below declared that the imprisonment of petitioner was lawful and that he was not entitled to a discharge from custody. [97, 118]

Specification of Error

The courts below erred in remanding petitioner to custody and holding that his detention was valid.

Reasons Relied on for Granting Writ

The holding of the court below that the writ of habeas corpus was available to determine the legality of detention of one convicted for refusal to submit to induction in violation of the Selective Training and Service Act is in direct conflict with the holding of the United States Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190.

The holding of the court below that the denial to one charged with refusal to submit to induction of his right to challenge the validity of the draft board order did not constitute a denial of procedural due process of law and of a judicial trial so as to make the judgment subject to collateral attack is in direct conflict with applicable decisions of this Court. *McVeigh* v. *United States*, 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278-279; *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418; *Old Wayne Life Ass'n* v. *McDonough*, 204 U.S. 8, 23; *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, 401; *Griffin* v. *Griffin*, 66 S. Ct. 556.

The holding of the court below that the denial to petitioner of his right to challenge the validity of the draft board order in response to the indictment charging him with refusal to submit to induction did not constitute an ouster of jurisdiction so as to make the judgment of conviction subject to collateral attack by writ of habeas corpus is in direct conflict with applicable decisions of this Court. *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 23-25.

The holding of the court below that the denial of the constitutional right to defend the indictment on the ground that the draft board order was invalid is reviewable only upon direct appeal and not collaterally by habeas corpus is in direct conflict with applicable decisions of this court. *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Waley*

v. *Johnston*, 316 U. S. 101; *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey*, 261 U. S. 81, 91; *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1; *Callan* v. *Wilson*, 127 U. S. 540; *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275.

The holding of the court below that the determination of the draft boards and the order supporting the indictment were valid and had basis in fact and that the petitioner was not arbitrarily and capriciously denied his claim for exemption is in direct conflict with the holding of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, where the facts before the draft board were substantially the same as here. There the court held that the draft board determination and order were contrary to the due process clause of the Fifth Amendment.

In addition to the fact that the holding of the court below is in conflict with applicable decisions of this Court, the petitioner claims, for additional grounds supporting the granting of the writ, that the court below has decided important questions of federal law which have not been, but should be, settled by this Court. Moreover, the court below has so far departed from the accepted and usual course of judicial proceedings in habeas corpus cases and has also sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision.

WHEREFORE your petitioner prays that this Court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

THEODORE MARTIN SUNAL, *Petitioner*

By HAYDEN C. COVINGTON, *his Counsel*

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

ONE

Refusal by the sentencing court to permit petitioner to challenge the validity of the draft board order, in defense to the indictment charging him with refusal to submit to induction, was a denial of a judicial trial contrary to the due process clause of the First Amendment to, and the bill-of-attainder clause of the Constitution, so as to make the judgment of conviction subject to collateral attack on a writ of habeas corpus, irrespective of the validity of the draft board proceedings.

The decisions in *United States ex rel. Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 744), *United States ex rel. Falb* v. *Kennedy* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 745), and *United States ex rel. Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847 * are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for and submit to a preinduction physical examination prevented the armed forces from determining

* See Note 17 of the majority opinion written by Mr. Justice Douglas in Estep v. United States, 66 S. Ct. 423, 428.

whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders. Since petitioner had completed the selective process upon reporting for induction he is in a position to challenge the administrative orders in defense to the indictment charging him with refusal to submit to induction. The denial of this right by the convicting court entitles him to the writ of habeas corpus.

Mr. Justice Douglas, speaking for the court in *Estep* v. *United States* (66 S. Ct. 423, 428), recognizes that there is a distinction between the situation presented in the *Lohrberg, Falbo* and *Arpaia* cases, supra, and that presented upon a petition for habeas corpus where the prisoner had exhausted the selective process. In footnote 17 of the *Estep* opinion (pp. 428-429) he declares that, "It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of habeas corpus was denied. *United States ex rel. Falbo* v. *Kennedy*, 4 Cir., 141 F. 2d 689. And in a like situation habeas corpus was denied in advance of the trial. *Albert* v. *Goguen*, 1 Cir., 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of habeas corpus followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See *Bowen* v. *Johnston*, 306 U. S. 19, 59 S. Ct. 442, 83 L. Ed. 455; *Ex parte Williams*, 317 U. S. 604, 63 S. Ct. 431, 87 L. Ed. 491; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end."

In petitioner's case here no additional step in the selective process remained to be taken. There was no other "corrective procedure" available to petitioner "which might

have afforded relief from the orders complained of." He pursued the selective process to the very end as did Estep in the case of *Estep* v. *United States*, 66 S. Ct. 423.

The court below was correct in refusing to follow the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, cert. den. 66 S. Ct. 820, rehearing den. 66 S. Ct. 959.

The same ground for denial of petition for writ of habeas corpus was urged in the case of *House* v. *Mayo*, 324 U. S. 45. This Court, concerning its previous denial for writ of certiorari in that case, said:

"The district court also referred to a denial by this court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo*, 322 U. S. 710, 64 S. Ct. 1058. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629; *State of Ohio ex rel. Seney* v. *Swift & Co.*, 260 U. S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176; *United States* v. *Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361; *Atlantic Coast L. Ry.* v. *Powe*, 283 U. S. 401, 403, 404, 51 S. Ct. 489, 499, 75 L. Ed. 1142."

In further support of the fact that the denial of certiorari in the *Rea* case, *supra*, should not be accepted as ground for denial of the questions presented here, it should be observed that the questions presented in the cases of *Estep* v. *United States*, and *Smith* v. *United States*, 66 S. Ct. 423, were previously presented to the court in *Rinko* v. *United States*, 147 F. 2d 1. Petition for certiorari was denied, 325 U. S. 851, 894. See also note 15, *Estep* v. *United States*, *supra*.

The principles announced in *Bowen* v. *Johnston,* 306 U. S. 19, are applicable here. There it was stated that if the absence of jurisdiction appeared on the face of the record made in the trial court upon the trial of the indictment, it would be reviewable on a writ of habeas corpus. (*Ibid.* p. 26) In that decision it was also said that the general rule, that habeas corpus is not available where the question could be raised upon appeal, is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (*Ibid.* p. 27) In the case at bar there was such uncertainty and doubt and confusion at the time of the trial by the district court in Pennsylvania as to the availability of the defense to the indictment that such presents unusual circumstances warranting the writ of habeas corpus. (*Ibid.* p. 27)

In *Johnson* v. *Zerbst,* 304 U. S. 458, the court announced a principle and made a holding that is a precedent for the action petitioner requests here. In that decision it is said: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" (*Ibid.* 468) See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25; *Ex parte Siebold,* 100 U. S. 371, 375.

The denial of petitioner's constitutional right to attack the draft board order contrary to the express commands of the fundamental compact is such an error that is not only reviewable upon appeal but is also subject to review and collateral attack upon a petition for writ of habeas corpus.

If a federal judge of a district court refuses to conduct a judicial trial, as did the judge of the convicting court in the case at bar, and proceeds to cut out the only defense and try the case by illegal theory similar to "trial by ordeal", in violation of the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I, prohibiting bills of attainder, and Article III investing the judicial powers in the courts and not in administrative agencies, then such federal court *loses jurisdiction* or is ousted of jurisdiction to proceed further and pronounce sentence against petitioner. *Johnson* v. *Zerbst,* 304 U. S. 458, 468. See also *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324, and *Jones* v. *Huff* (App. D. C.) 152 F. 2d 14.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process of law. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of Mr. Justice Murphy.

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill-of-attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. *Cummings* v. *Missouri,* 4 Wall.

277, 320-332; *Kentucky* v. *Jones*, 10 Bush. (70 Ky.) 725; *United States* v. *Lovett*, 66 S. Ct. 1073. A judgment rendered upon a trial where there has been a denial of a fundamental constitutional right or due process of procedural law is a nullity and subject to collateral attack, including attack by habeas corpus. *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.*, 242 U. S. 394, 401; *Griffin* v. *Griffin*, 66 S. Ct. 556.

The doctrine of denial of defenses because of contempt of the law and flouting of the orders of administrative and judicial officers has never been approved by the courts. In *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418, the court held subject to collateral attack a judgment where the answer of the defendant had been stricken because of contempt of court. The court held that the entry of the judgment without affording an opportunity to defend was a violation of the citizen's rights of due process.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh* v. *United States*, 11 Wall. 259, 267; *Bradstreet* v. *Neptune*, 3 Sumn. (U. S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *McVeigh* v. *United States,* 11 Wall. 259, 267, the court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice."

In *Rogers* v. *Peck,* 199 U. S. 425, 435, the court said that a defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279, it is said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

The construction of the Act so as to deny judicial review of administrative action, which concededly is available upon petition for writ of habeas corpus, is a rank denial of due process of law and of the right to be heard in one's defense. *Hovey* v. *Elliott,* 167 U. S. 409, 413-418: "[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law

signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever to be heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?"

In *Edwards* v. *United States*, 312 U. S. 473, the court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

The court, in *Dowell* v. *United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. The court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz* v. *United States*, 223 U. S. 442; *Lisemba* v. *California*, 314 U. S. 219, 236.

The fact that the writ of habeas corpus has been broad-

ened so as to reach many different types of violations of procedural due process impels the conclusion that refusing petitioner the right to attack the draft board order is a denial of a judicial trial contrary to the due process clause and is equally subject to attack by habeas corpus, which penetrates and goes behind the judgment and reviews the substance of the matter, either on the record or *de hors* the record, regardless of whether there has been an appeal or failure to take an appeal. The following types of errors and inquiries inflicted contrary to the Constitution have been, among many others, reviewed upon the writ of habeas corpus, although the questions could have been raised upon appeal:

(1) Erroneous denial of a plea of former jeopardy. *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Clowans* v. *Rives*, 104 F. 2d 240.

(2) Erroneous reception into evidence a confession obtained in violation of the due process clause by force, etc. *Jones* v. *Kentucky* (CCA-6) (1938) 97 F. 2d 335.

(3) Illegal forcing or obtaining a plea of guilty. *Waley* v. *Johnston*, 316 U. S. 101; *Smith* v. *O'Grady*, 312 U. S. 329.

(4) Proceeding to judgment of guilty after trial dominated by mob violence which could have been complained of at trial and raised on appeal. *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey*, 261 U. S. 86, 91.

(5) Trial by information for a felony contrary to the Constitution, which could have been raised upon appeal. *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1, in which latter case the indictment was amended, without return to grand jury, by the prosecutor.

(6) Denial of trial by jury which should and could have been raised on appeal. *Callan* v. *Wilson*, 127 U. S. 540.

(7) Illegal denial of counsel which could have been raised upon appeal. *Johnson* v. *Zerbst*, 304 U. S. 458, 463, 468; *Walker* v. *Johnston*, 312 U. S. 275; *United States ex rel. McCann* v. *Adams*, 320 U. S. 220, 221; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

The denial of the right to make any and all valid defenses upon a trial, such as refusing petitioner the right to attack the draft board order, is equal to, if not worse than, a denial of the right to have counsel. The Constitution guarantees both. Without the granting of either, upon request not waived as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived of the right of counsel it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses that the draft board order was invalid, it does him no good to have counsel. If habeas corpus attack collaterally made can reach the denials of one it should reach the other because there is no difference between the two rights. Cf. *United States ex rel. McCann* v. *Adams*, supra; with *Adams* v. *United States ex rel. McCann*, supra. The decision of the United States Eighth Circuit Court of Appeals in *Manning* v. *Biddle*, 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

Even assuming, *arguendo*, that petitioner had the opportunity of raising these objections in the Circuit Court

of Appeals on an appeal, yet he would not be precluded from raising constitutional questions upon his petition for writ of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great magnitude they cannot be waived by failure to object, even if petitioner was represented by counsel. If the questions are such that they can be considered on a petition for writ of habeas corpus, they cannot be waived even if petitioner had failed to submit to the sentence and had taken an appeal. *Screws* v. *United States,* 325 U. S. 91.

Similarly in *Waley* v. *Johnston,* 316 U. S. 101, the court extended the writ and broadened its scope in order to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said (pp. 104-105): "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. *It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.*" (Italics added)

The courts below held that the writ of habeas corpus was properly discharged because, upon the evidence, it appears that petitioner is not a minister of religion within the meaning of the Act and therefore the United States District Court for the Western District of Pennsylvania did not commit any prejudicial error against petitioner when the evidence appearing in the draft board file was excluded from consideration by the court and jury, or when the court instructed the jury that it could not consider the alleged illegality of the draft board determination. In other words, the courts below held that the alleged error

in denying petitioner due process of law was harmless error, because petitioner would not have been able to establish that he was a minister and that the draft board acted illegally, even if the convicting court had ruled properly. This holding of the courts below begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of the courts below that petitioner is not a minister of religion. Suppose the convicting court had denied petitioner the right to counsel. Can it be reasonably said that such denial could be cured by a finding of the courts below that petitioner had no good defense to the indictment because his draft board file showed that he was not a minister of religion and was therefore guilty of failing to submit to induction? Suppose the court would have put him to trial upon an information rather than an indictment. Suppose the court erroneously overruled a plea of former jeopardy. Suppose petitioner was convicted upon a confession illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft board file showed that petitioner is not a minister and that he is guilty? The mere asking of these questions answers with a resounding NO. If petitioner was denied due process of law, as he claims, then there is only one method whereby that denial can be cured. That way is to discharge petitioner without prejudice to the rights of the Government to reindict and retry him, so that upon another trial he will have an opportunity to make his defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the petitioner is admittedly guilty, as the courts below held here.

The efforts of the courts below to hold that the action of Judge Schoonmaker at Erie, Pennsylvania, in refusing

to consider or to permit the jury to consider the illegality of the administrative action cannot succeed. A similar attempt was made by the court below in *Smith* v. *United States,* 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case in this Court. This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the court below in its affirmance of the judgment. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the court limited determination of the issues to whether the defendant complied with the order. In this case the court trying the indictment limited the determination to whether the petitioner complied with the order to submit to induction. Moreover, in the *Smith* case, as well as in this case, the trial court did not pass upon the legality of the administrative determination.

If the courts below can pass upon the validity of the administrative determination after reviewing the draft board file, then the convicting court should have done so. Inasmuch as the convicting court failed to consider the legality of the administrative determination, and failed to permit the jury to determine the legality of the administrative action, the error, which is a denial of due process, cannot be cured by the rationalizing of the courts below in this case. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the court below. *Smith* v. *United States,* 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and *Smith* cases (66 S. Ct. 423, 429): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If this Court was of the opinion that the performance

of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the courts below were of the opinion that the draft board did not err in making its classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error by habeas corpus on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the courts below to hold as harmless error the denial of due process by the United States District Court for the Western District of Pennsylvania is an effort to use habeas corpus inquiry into a trial *de novo* of the guilt or innocence of the petitioner.

Only one court has jurisdiction to determine the guilt or innocence of the petitioner under the indictment, and that is the United States District Court for the Western District of Pennsylvania. The failure of that court to exercise its judicial function does not authorize the courts below to reconsider the evidence *de novo* to determine whether or not petitioner is guilty. The convicting court having failed to exercise its function in this regard cannot be exonerated from the violation of the Constitution because the courts below saw fit to allow petitioner a full and fair trial on the alleged illegality of the administrative determination, while he was yet in prison and after his conviction.

The holding of the courts below that, although the writ of habeas corpus was available, the petitioner should be remanded because the draft board proceedings were found

to be valid, is an extraordinary departure from due process of law in habeas corpus cases. If this doctrine be sustained, then a new rule will have been grafted onto habeas corpus law which would defeat the very purpose of the writ. The judgment of conviction was invalid because of the denial of the right to be heard on the validity of the draft board determination. The denial of this right entitled petitioner to the writ of habeas corpus. The invalidity of the judgment, because of the denial of the right, cannot be validated by the habeas corpus court inquiring into the validity of the draft board proceedings. Once the judgment is invalid so as to justify the writ of habeas corpus the validity cannot be restored by the habeas corpus court performing the judicial function that the convicting court refused to perform. The novel method of disposing of the prisoner presents a threat to the inherent efficacy of the writ of habeas corpus. Such a rule would permit habeas corpus courts to inquire into the guilt or innocence of the prisoner for the purpose of determining the validity of his detention. This would enable habeas corpus courts to remand prisoners who have been denied constitutional rights on a finding that the denial of such rights was harmless error. Such a rule would enable judges of habeas corpus courts to nullify entirely the rights of prisoners under the writ.

TWO

Even assuming that petitioner's right to release upon the writ of habeas corpus is dependent exclusively upon the invalidity of administrative proceedings, the undisputed evidence shows that the draft boards arbitrarily and capriciously denied him his claim for exemption from training and service as a minister of religion and that the classification given him was without basis in fact; accordingly, the order supporting the indictment was void.

The holding of the court below that petitioner should be denied his release because the draft board did not violate the law, in denying him his claim for exemption as a minister of religion, again presents to this Court the necessity of expressing itself upon what is the meaning of the terms "regular minister of religion" or "duly ordained minister of religion" as used in the Act and Regulations.

Jehovah's witnesses have been declared to be a religious organization under the Act by the Selective Service System.* The draft boards and the lower federal courts have ignored the true facts in respect to the ministerial activity and status of Jehovah's witnesses. This has been done by arbitrarily and discriminatorily applying what constitutes a "minister of religion" according to the standards of the popular orthodox religious denominations to a basically different dissentient organization. The undisputed evidence in this case shows that Jehovah's witnesses are a society of missionary evangelists. The evidence showed without dispute that petitioner was engaged in the

* Selective Service National Headquarters: Opinion No. 14, June 12, 1941; Opinion No. 14 (amended) November 2, 1942; State Director Advice No. 213-B, June 7, 1944; State Director Advice No. 213-B (amended) September 25, 1944; *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-1942, Government Printing Office, Washington 1943, pp. 239-241.

full-time missionary evangelistic work. He preached the gospel from house to house. Moreover, he delivered sermons at gatherings as do the orthodox clergy. In addition to this he preached in the homes of the people in the apostolic manner, serving a large congregation divided into several small groups in the homes of the people. The only difference between his method of preaching and that of the orthodox clergy was that he took the message to the people in their homes; the people did not come to him as do the members of the orthodox religious denominations. The undisputed evidence showed that his whole life was devoted to furtherance of the work of Jehovah's witnesses.

It is true that he performed secular work, devoting approximately 120 hours monthly. However, it should be remembered that this did not interfere with the performance of his duties as a full-time missionary evangelist. He spent an average of 150 hours monthly in missionary work. This was the quota established by the Watchtower Society for full-time pioneer missionary evangelists.

The court below held that petitioner was not a minister because he was not a "pastor" or "shepherd" of a congregation of laymen in the sense that the orthodox religious clergy are. The court below illegally and unlawfully construed the Act so as to include *only* ministers of the orthodox religious denominations and persons of other religious denominations who stand in the same relationship to their organizations "as do regularly ordained ministers of older and better known religious denominations." [117; see also 115-117]

In thus construing the Act, the court below placed a narrow strict interpretation upon the term "ordained minister" which is contrary to the policy of giving a broad and liberal interpretation to religious exemptions. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosario de Filipinas,* 263 U. S. 578; *Helvering* v. *Bliss,* 293 U. S. 144.

Furthermore, such construction placed upon the Act is a perversion of the intent of Congress, by confining the exemption to some ministers of some religious organizations instead of to all ministers of all recognized churches and organizations. Also the interpretation placed upon the Act by the court below discriminated against Jehovah's witnesses in favor of "older and better known religious denominations". [117]

In giving such narrow interpretation to the Act and in declaring that petitioner was not entitled to the exemption [redacted] of his performance of part-time secular work [redacted] himself in the ministry, the court below erroneously [redacted] as a religious *hierarchy* and pronounced ecclesiastical anathema against petitioner, rather than applying the law of the land. This course of action taken by the court below is contrary to the spirit of fairness extended to all religious denominations by the courts in administering like exemption accorded ministers of religion in other statutes.

The arguments of the court below were rejected at an early day in this country by the Supreme Court of Alabama in construing the exemption provision of the conscription act of the Confederacy in the war between the States. The court said: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously." (*Ex parte Cain,* 39 Ala. 440-441)

If the decision of the court below is permitted to stand, disastrous and far-reaching devastating effects may be reached. If a regular and duly ordained minister of religion who, in every sense of the word, qualified as an ordained minister and conforms to the regulations of his organization, can be denied his exemption because some of his time

is devoted to other matters outside of his ministry, then the deferments and exemptions granted by Congress under the Act are in danger of being nullified completely.

Congress provided for the deferment of the vice-president of the United States, members of Congress, judges of courts, members of state legislatures, and governors of the various states, as long as they continued in office. It provided for the exemption of ministers of religion. Certainly Congress did not intend to deny the deferment to a member of Congress because he practiced law on the side. The Congress did not intend to permit the deferment to be withdrawn from a judge of a court because he operated a farm as an avocation. It did not intend to deny the deferment to governors of the states because they may have business and economic interests that they maintained and operated while occupying office. Certainly Congress did not intend to deny the rich clergy their exemption because much of their time is devoted to care of investments, bonds and stocks and other economic enterprises.

Since it was not intended that the deferment and exemption should be denied in any of the above hypothetical situations, it must be assumed that Congress did not intend to deny the exemption to the poor preacher who is forced to work, or who chooses to work, part of the time to sustain himself in his full-time ministry pursuits and occupation. It must be assumed that Congress intended to accord the exemption, as is shown in the Selective Service Regulations (Section 622.44), to every person "who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member", irrespective of whether he devotes time on the side to other pursuits to earn his livelihood.

The court below cites a large number of cases to sustain its conclusion that petitioner was not a minister of religion. [117-118] All the courts that rendered the decisions, denying the exemption to Jehovah's witnesses, including the

court below, have arbitrarily and discriminatorily judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by reporting for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

Moreover, the decision of the court below is directly in conflict with *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Follett* v. *McCormick*, 321 U. S. 573, in which cases it was held that Jehovah's witnesses are ministers of religion engaged in preaching the gospel of God's kingdom as regular and duly ordained ministers entitled to full protection of the law

that is accorded to the ministers of the "older and better known religious denominations". [117]*

Much could be written so as to state the many reasons answering the multifarious arguments that petitioner and Jehovah's witnesses are not entitled to exemption as ministers of religion. Time and time again thorough explanations have been made to this Court in draft cases on all questions related to this subject. However, in none of such cases have the questions been reached for decision. Time and space will not be utilized here to restate these matters. Some of the questions were succinctly discussed in the petition for writ of certiorari filed in No. 290, October Term 1946, *Swaczyk* v. *United States.* (See pages 21-41.) Exhaustive and elaborate argument on many of the related questions inherent in this case was made to this Court in joint brief for petitioners filed in No. 66, October Term 1945, *Smith* v. *United States* and No. 292, October Term 1945. *Estep* v. *United States.* (See pages 131-190.) Reference is here made to the arguments appearing at the respectively designated pages in said petition and joint brief and incorporated here as though copied at length.

* See also *Semansky* v. *Stark,* 196 La. 307, 199 S. 129; *Shreveport* v. *Teague,* 200 La. 679, 8 S. 2d 640; *Thomas* v. *Atlanta,* 59 Ga. App. 520, 1 S. E. 2d 598; *Jones* v. *Moultrie,* 33 S. E. 2d 561; *Burns* v. *Carrollton,* 34 S. E. 2d 621; *State* v. *Meredith,* 197 S. C. 351, 15 S. E. 2d 678; *Donley* v. *Colorado Springs,* 40 F. Supp. 15; *Commonwealth* v. *Akmakjian,* 316 Mass. 97, 55 N. E. 2d 6; *Commonwealth* v. *Richardson,* 313 Mass. 632, 638.

Conclusion

It is submitted that this case is one calling for the exercise by this court of its supervisory powers under the Judicial Code and the Rules of this court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgment rendered by the circuit court of appeals and the district court against petitioner be reversed and petitioner discharged or, in the alternative, that the judgments be reversed and a new trial ordered.

Respectfully submitted,

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